

Commentary: District Court Cases

Babcock v. Babcock, No. 3:20-cv-00066, 2020 U.S. Dist. LEXIS 224778 (S.D. Iowa Nov. 30, 2020)

Other District Court Cases

Nowlan v. Nowlan,
Civil Action No. 5:20cv00102, 2021 U.S. Dist. LEXIS 10824 (W.D. Va. Jan. 21, 2021)

Adkins v. Adkins,
No. 19-cv-05535-HSG, 2020 U.S. Dist. LEXIS 207559 (N.D. Cal. Nov. 5, 2020)

Wan v. Debolt,
No. 20-cv-3233, 2020 U.S. Dist. LEXIS 197996 (C.D. Ill. Oct. 26, 2020)

Jacquety v. Baptista,
19 Civ. 9642 (VM), 2020 WL 5946562 (S.D.N.Y. Oct. 7, 2020)

Da Silva v. Vieira,
No. 6:20-cv-1301-Orl-37GJK, 2020 U.S. Dist. LEXIS 174167 (M.D. Fla. Sep. 23, 2020)

Trott v. Trott,
No. 20-CV-1392 (AMD) (CLP), 2020 U.S. Dist. LEXIS 151818 (E.D.N.Y. Aug. 21, 2020)

Leon v. Ruiz,
No. MO:19-CV-00293-RCG, 2020 U.S. Dist. LEXIS 43758 (W.D. Tex. Mar. 13, 2020)

Cunningham v. Cunningham,
237 F. Supp. 3d 1246 (M.D. Fla. 2017)

Marquez v. Castillo,
72 F. Supp. 3d 1280 (M.D. Fla. 2014)

Habitual Residence | Wrongful Retention | Child's Objection to Return

In this case, a mother filed a petition for the return of her child to Canada after the father refused to send the child back from the United States after a visit.

Holding

The district court ordered that the child to be returned to Canada, his habitual residence. The child's objection to return was insufficient to warrant a refusal to return him.

Facts

The parents and their four children were residents of Camanche, Iowa. The mother, a citizen of Canada, was incarcerated for embezzlement for four years. Upon her release, she was deported to Canada. The couple planned to relocate the family, and the mother found housing in Windsor, Canada. The four children joined her in June 2017, and almost all the family possessions were moved to Windsor. The father, a U.S. citizen, went to Canada for short visits but was unable to obtain permanent residence in Canada due to his own criminal record. The parties' youngest child, N.J.B., entered a Canadian school, participated in sports, and made friends. Six months later, in December 2017, the parties separated, and the father returned to Iowa. He did not see his children for approximately eighteen months. The mother obtained a custody decree from Canada granting her custody of the children.

In the summer of 2019, the children went to Iowa for a short visit with the father; upon his request, the children were allowed to remain with him until the end of the summer. On August 18, 2019, he allowed the older children to return to Canada but refused to return the youngest child. The mother immediately urged law enforcement authorities in Iowa to render assistance for the return of the youngest child and employed other measures to secure the child's return, including requesting assistance from the Canadian Central

Authority. When these efforts proved unsuccessful, she filed a Hague petition in federal court on August 20, 2020—one year to the day that the child had been wrongfully retained in Iowa.

Discussion

Habitual Residence. The court found that the child’s habitual residence had not changed from Canada to Iowa, based on a combination of factors that included the child’s attachment to school, friends, sports activities, medical needs, and close relationship with his siblings. Additionally, the court found that the child’s move from Canada to Iowa was transitory. Both parents agreed that the child would extend his stay in Iowa for a period of two months and that he would return to Canada for the beginning of school in the fall of 2019.

Date of Wrongful Retention. Relying principally on *Slagenweit v. Slagenweit*¹ and two Third Circuit cases² for its holding, the court determined that the date of wrongful retention was August 20, 2019. This was the date that the mother clearly and unequivocally withdrew her consent to the child’s stay in Iowa by contacting law enforcement to help with the child’s return. The court concluded that on this date, the mother knew, or should have known, that the child would not be returned.

Delay Defense. The father argued that he was entitled to raise the delay defense because the mother filed the petition for return more than one year after the child was in Iowa. The court relied on Federal Rule of Civil Procedure 6(a) to compute the time between August 20, 2019 (the date of wrongful retention), and August 20, 2020 (the date the mother’s return petition was filed), and found that the period of time did not exceed the one-year period set forth in Article 12 of the Convention.³ Even assuming, for the sake of argument, that the mother’s petition had been filed after the one-year period, the court concluded that it would uphold the mother’s petition for return because of her diligence in seeking the child’s return and the court’s authority to return a child despite the existence of a defense.

Mature Child’s Objection to Return. The court interviewed the child via videoconference without the child’s parents or their attorneys present. The twelve-year-old child said that he would rather remain with his father in Iowa. He expressed reluctance to return to Canada because (1) his brothers in Windsor picked on him and compelled him to do the chores, his school in Canada was hard, and he was not a “city” person; (2) he liked Iowa better because he could learn more things in school, had more friends there, and participated in sports; and (3) he felt safer with his father because his father had cared for him

1. 841 F. Supp. 264, 270 (N.D. Iowa 1993) (wrongful retention begins when parent clearly communicates desire to regain custody and assert parental right to the same).

2. *Karkkainen v. Kovalchuk*, 445 F.3d 280, 290 (3d Cir. 2006) (date parent unequivocally communicated objection to continued retention of the child); *Blackledge v. Blackledge*, 866 F.3d 169, 179 (3d Cir. 2017) (parent has clearly and unequivocally communicated custody rights and lack of consent to child’s continued retention through words, or actions, or combination of both).

3. Article 12 states in part, “Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.”

in Iowa when the child's mother was in prison. The court found that the child's objections were more general than specific in nature and noted that it suspected the father's undue influence.

Other Defenses. The court refused the father's grave risk defenses that the child was being physically abused by his older brothers, that there was a lack of supervision, and that the family had financial problems. The court found the evidence insufficient.

The court ordered that the child be returned to Canada.